Jersey & Guernsey Law Review – February 2012

MISCELLANY

Caveats

1 The Jersey customary law process of lodging an *opposition à la passation d'un contrat héréditaire*[1] (now known more prosaically as a caveat) has undergone a quiet revolution in recent years. Lodging a caveat with the Bailiff is, or was, one of those simple self-help procedures that helped to ensure in a small Island community that dishonest debtors did not escape their obligations by selling up and leaving the jurisdiction. It was analogous to an *ordre provisoire*, except that the remedy was available without any active judicial intervention. It came into force from the date upon which the o*pposition* was lodged with the Bailiff.[2] A person had only to write to the Bailiff, setting out a claim that he was a creditor of X, and that he was opposed to the passing of any contract of alienation by X of his hereditaments, and the obstacle to any such transaction was in place. It was one of the few remedies obtainable against a debtor who was *fondé en heritage*, *ie* who owned immoveable property, out of term time.

2 It was, however, always a remedy to be sought with circumspection. As Le Gros stated at p 330, "*[l]e créancier . . . doit agir avec le plus grand soin dans toute démarche qu'il fait auprès du Chef Magistrat*." The creditor should not lightly put obstacles in the way of dealing with immoveables. He should seek settlement from the debtor, or give him the opportunity to furnish security. He should always act in good faith and without any hostile intent towards the debtor. The court would punish any inappropriate abuse of the privilege of the *opposition*

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[1] See Le Gros, *Droit Coutumier de Jersey*, Les Chroniques de Jersey Ltd, 1943, at page 330; republished by Jersey and Guernsey Law Review Ltd, 2007.

[2] See Rule 15/5(2) of the Royal Court Rules 1968 (R&O 5107). Rule 14/5 of the Royal Court Rules 1982 (R&O 7026) introduced a requirement for a file in the Public Registry into which all caveats were to be placed. The caveat continued to come into force, however, upon lodging with the Bailiff. It was only upon the enactment of Rule 14/5(3) of the Royal Court Rules 1992 (R&O 8509) that a caveat was stated not to come into force until being placed in the file in the Public Registry by the Greffier.

procedure by ordering the creditor to pay damages to the debtor and the costs of the process.[3] In *de Gruchy v Hackett*,[4] for example, the defendant architect lodged an *opposition* in relation to unpaid fees of 25 guineas. The plaintiff applied to set aside the *opposition* on the grounds that the claim was unparticularized, that no proceedings for recovery had been begun, nor security sought, and that she was a native of Jersey possessed of immoveable property of considerable value. The *opposition* was set aside and the defendant ordered to pay damages of £25 and extraordinary expenses of £20.[5] In short, the lodging of an *opposition* was a robust but slightly primitive means whereby creditors could engage the law to protect their interests.[6]

3 Statutory changes and recent judicial decisions have adapted the process to make it more attuned to contemporary practice. A significant amendment came into effect with the passage of the Royal Court Rules 2004. Rule 18/5(1) provided that a caveat might not be lodged without the leave of the Bailiff. For the first time the mere lodging of the caveat was not sufficient to bring the prohibition against the passing of a contract into effect. Rule 18/5(2) required that the application for leave be supported by an affidavit, and stated that the application for leave might be made *ex parte*.

4 In *Mackinnon v Crill*,[7] the respondent firm had represented the applicant in trusts litigation, and sought payment of their fees which exceeded £600,000. The applicant disputed the level of fees and refused to pay £350,000. The respondents did not begin proceedings because they hoped to compromise the claim. Instead, having unsuccessfully sought security from the applicant, they obtained a caveat over a property jointly owned by the applicant and his brother. Unfortunately, as a result of complications which are not relevant for these purposes, a contract for the sale of the property was in fact passed notwithstanding the existence of the caveat, and the purchase price of £3.2 million was paid over to the brothers in England. The

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[3] There is a parallel approach to the employment of another self-help remedy, namely the *Clameur de Haro*, where the court will punish the wrongful invocation of the court's jurisdiction by ordering the payment of damages.

[4] (1934) Ex 82, 9 June.

[5] In *Le Manquais v Le Bas* (1832) Ex 281, 5 May, the defendant had offered security for any sums due, but this had been rejected. The court lifted the *opposition* and ordered the plaintiff to pay damages of £40 and costs.

[6] It is perhaps doubtful whether damages would in practice any longer be awarded, given that since 2004 the Bailiff's leave has been required to lodge a caveat, although the power is reserved by Rule 18/5(6).

[7] 2006 JLR 499.

purported sale was accordingly void, and the applicant sought to set aside the caveat so that a fresh conveyance could take place.

5 Relying on a passage from Le Gros, and the decision in *De Gruchy v Hackett*, it was argued by the applicant that—

(a) a creditor must notify the debtor that a claim is made and give the debtor the opportunity to provide security before seeking a caveat;

(b) a caveat cannot be obtained against a solvent debtor;

(c) normal causes of action available to a creditor must first be pursued, the lodging of a caveat being a remedy of last resort; and

(d) the circumstance giving rise to the need for a caveat must be exceptional.

6 The court accepted that a creditor should notify the debtor before seeking a caveat, but rejected the remaining three submissions. Birt, Deputy Bailiff (as he then was) likened the application for a caveat to an application for a *Mareva* injunction. "A caveat is, in reality, a form of *Mareva* injunction relating to immoveable property in Jersey".[8] It was perfectly proper to make the application *ex parte*, as permitted by Rules of Court, but there was a duty, as with all such applications, to make full and frank disclosure to the court.[9] A convenient summary as to what was required by full and frank disclosure was to be found in *Goldron Ltd v Most Invs. Ltd*.[10] The court dismissed the applicant's summons which sought to discharge the caveat on the ground that it should not have been issued at all.

7 The applicant immediately issued a further summons to lift the caveat on a number of other grounds. That summons was also dismissed, and a further judgment[11] dealt with those grounds. First, the court rejected the submission that a caveat could not be lodged for a contested debt. The creditor should act in good faith and disclose the fact that the alleged debt is contested. But the fact of a dispute did not render the caveat void. Secondly, a caveat was not rendered void by reason of a failure to give notice to the debtor. It was a matter to be taken into account when the court's discretion as to whether the caveat

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[8] *Ibid* at p 505, para 18.
[9] *Ibid* at para 22 *et seq*.
[10] 2002 JLR 424, at paras 14–16.
[11] 2006 JLR 510.

should be lifted was under consideration.[12] On the facts of the case, the court found that the caveat should be maintained in force.

8 Two recent cases throw further light on the court's approach to this ancient remedy. In *Devy v Taylor*[13] Birt, Bailiff, expressed the view that, notwithstanding the remarks in *Mackinnon* as to the similarity between a caveat and a *Mareva* injunction, the threshold for obtaining a caveat was lower than for a *Mareva*. The Bailiff stated that—

> "38 . . . we think it helpful to emphasize the distinction between a caveat and a *Mareva* injunction. A *Mareva* injunction is a very considerable restriction on a defendant's ability to carry on with his everyday life. The injunction usually restrains him from dealing in any way with any of his assets . . .
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> 39 A caveat is very different. It only prohibits a defendant from selling or charging his immoveable property. This is something which most person do only very infrequently. Unless a defendant wishes to sell or charge his home, a caveat will in fact have no effect on his day-to-day life or his ability to spend money on whatever he chooses. If he wishes to sell or charge his home, the court will invariably sit at short notice in order to resolve the position.
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> 40 In the circumstances, the prejudice caused by a caveat is normally very much less than that caused by a *Mareva* injunction. It follows that the threshold for imposing a caveat and regarding it as a proportionate measure to protect an alleged creditor is likely to be lower than that for a *Mareva* injunction."

9 In *Clarke v Callaghan*,[14] a dispute over a failed business venture between the plaintiff and the first defendant was resolved at mediation. The first defendant was an hotelier residing at Eulah Country House ("Eulah"). He was the majority shareholder in the second defendant, which was the owner of Eulah. The third defendant was a company carrying on the hotel business at Eulah. The compromise agreed by the first defendant at mediation involved the payment by him of three sums of money. The first two sums were duly paid, but the third was not. The mediation agreement contained the clause "This agreement also binds the second and third defendants". The plaintiff made formal

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[12] It may be that a different view would now be taken. An amendment to the Royal Court Rules (R&O 68/2007) now provides expressly that "the applicant shall give written notice of the lodging of the caveat to every person whose immoveable property is affected by it" (Rule 18/5(3A)(a)).

[13] [2011] JRC 165.

[14] [2011] JRC 158.

demand and subsequently obtained a caveat against all three defendants. The caveat was subsequently withdrawn on payment of the sum due, but the question of costs arose in relation to the caveat.

10 The defendants contended that the application for a caveat was flawed. A caveat could only be obtained by a creditor against his debtor. The second defendant was the only defendant owning immoveable property, but was not the debtor. The debtor was the first defendant. The third defendant was not the debtor, nor did it own any immoveable property. The plaintiff submitted that the clause in the mediation agreement meant either that the debt was jointly and severally owed, or that the two companies had guaranteed the obligation of the first defendant. Alternatively the plaintiff was entitled to obtain a caveat against the second defendant because it was 90% owned by the first defendant.

11 The court rejected the plaintiff's arguments. Le Gros stated clearly that "*Un créancier a le droit de loger une opposition par écrit entre les mains du Chef Magistrat à l'aliénation des héritages de son débiteur*."[15] Neither the second nor third defendants could be described as debtors. The debtor was the first defendant, but he owned no immoveable property against which a caveat could have been obtained. The application for a caveat had been misconceived, and costs were awarded against the plaintiff.

12 The current state of the law may therefore be summarized as follows. A caveat is a remedy available to a creditor to prevent the alienation of immoveable property belonging to the debtor[16] to secure payment of the debt or alleged debt. In applying for the Bailiff's leave to lodge the caveat, the creditor is under a duty to disclose in his supporting affidavit all material facts. The application must be proportionate and made in good faith. Before applying for leave, the creditor should ordinarily give the debtor the opportunity of paying the amount or offering security.[17] In determining an application for leave to lodge a caveat, the Bailiff is likely to apply a lower threshold than would be appropriate in relation to an application for a *Mareva* injunction. A caveat renders void any contract of alienation of immoveable property belonging to the debtor while it is in force. A caveat remains in force for six months, but may be renewed from time

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[15] Le Gros, o*p cit*, at p 330.

[16] Semble, a caveat could be lodged to prevent the alienation of a contract lease.

[17] Le Gros, *op cit*, at p 330; *Pajama Ltd v Ferpet Investments Ltd* 1982 JJ 137, at 138.

to time.[18] Any person prejudiced by the continuation in force of a caveat may summons the caveator to appear before the court to show cause why the caveat should not be lifted.[19]

Prosecution duties of disclosure

13 The decision of the Guernsey Court of Appeal in *Taylor v Law Officers*[20] (summarised in the last issue of this *Review*[21]) is also significant because of its rulings in relation to the performance by the prosecution of the duties of disclosure placed on them. (This aspect of the case was omitted from the summary due to constraints of space.)

14 The appellant's complaint about the trial judge's decisions on disclosure included matters relating to public interest immunity (PII) arising from the alleged unlawful granting of a search warrant, made at a pre-trial hearing. The appellant alleged that the judge's refusal to order disclosure had hampered his advocate's ability to advance his application in respect of delay in the best light.

15 Having regard to the words of Lord Bingham in *R v H*,[22] and the essential requirement that the trial must be fair, the court ruled—

> "that the duty of the prosecution in Guernsey is to disclose any material which might reasonably be considered capable of undermining or weakening the case for the prosecution or of assisting the case for the accused." (para 131)

In doing so, the court expressly declined to set the test at the level required by *R v Ward*[23] and *R v Keane*,[24] both of which had been decided before the enactment of the Criminal Procedure and Investigations Act 1996, stating that the English common law position had been demonstrated to be unsatisfactory. Rather than crystallize the law of Guernsey by reference to the pre-1996 Act English common law (the provisions of the 1996 Act not having been replicated in Guernsey), the court properly saw its task as being to establish "the applicable test having taken advantage of experience gained elsewhere since the problems of non-disclosure became apparent".[25]

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[18] Rule 20/6(3).
[19] Rule 18/5(5).
[20] No 13/2011 (Nutting, McNeill and Birt JJA).
[21] (2011) J&G L Rev 372.
[22] [2004] 2 AC 134.
[23] [1993] 1 WLR 619.
[24] [1994] 1 WLR 746.
[25] *Ibid* at para 129.

16 This duty, therefore, imposes an obligation on prosecuting counsel to examine *all* the material and to disclose what must be disclosed. An assurance from counsel that this task has been performed conscientiously and that disclosable material has been duly disclosed should generally be accepted. Prosecuting counsel are, of course, officers of the court and good faith must be presumed. Indeed, the court cited with approval Lord Bingham's description in *R v H* of the duty of prosecuting counsel as "not to obtain a conviction at all costs but to act as a minister of justice" (para 136). Consequently, the court ruled that the suggestion from defence counsel that prosecuting counsel needed to be summonsed as a witness and cross-examined was quite inappropriate.

17 Although not apparently cited to the court, the decision of the Jersey Court of Appeal in *Dowes v Att Gen*[26] would seem to be on all fours with that approach. In that case, evidence of covert surveillance of D, which confirmed part of the story that he had given to the court, was not disclosed at trial by the prosecution. Shortly after conviction the Crown made the evidence available to the defence. The conviction was set aside, the Crown's failure to disclose being regarded as a substantial miscarriage of justice.

18 The Guernsey Court of Appeal also rejected the appellant's submissions about PII, concluding that the trial judge had not, as alleged, even ruled on PII. It confirmed that disclosure is a three stage process. The first stage compels the prosecution to sort through the unused material to assess whether any of it is "material" in accordance with established common law principles. This process does not concern the trial judge. In the event that the prosecution identify disclosable material which is also *prima facie* PII material, they are obliged, if they cannot disclose the material in a redacted or other form, as the second stage to place the material before the judge for his consideration. The third stage compels the judge, once he has considered the material and heard submissions *inter partes*, or from the prosecution *ex parte*, to perform the balancing exercise between the public interest in non-disclosure and the importance of the documents to the issues of interest to the defence, both present and potential, as referred to in *R v Keane* and refined in *R v H* (at para 36). As the prosecution review of the material did not lead to the second stage, the third stage was also not reached, meaning there was no ruling of the judge available for challenge by the appellant.

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[26] 1997 JLR *N*–7; 11 July 1997, unreported. See also *Hume v Att Gen* (CA) 2005 JLR 12, also presided over by Nutting JA.

19 Finally, in relation to the appellant's assertion that a warrant granted under s 8 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003 was unlawful, the court concluded that the use of that section, rather than a production order under s 9, is not excluded solely by virtue of the possibility that there may be special material on premises which is not being sought as part of the investigation. The court did not censure the trial judge for having considered, without giving notice to the parties that he would do so, the Information sworn in support of the application for the warrant, which formed part of the court file, but did recommend that such Informations should in future be considered for disclosure on a case-by-case basis rather than being regarded as a class of document not usually disclosed.

20 This important judgment provides clarity for Law Officers, defence counsel, and trial judges as to how to approach questions of what should and should not be disclosed before and during a criminal case. There are no shortcuts for the prosecution: a full assessment of the material available must be undertaken and disclosure made where it is required. By declining to ignore recent developments in England, including the intervention of the legislature, the court avoided leaving the law of Guernsey in an unsatisfactory state, recognising that its overriding obligation was to establish the principles relating to disclosure so as to ensure that the accused receives a fair trial. It will no doubt be followed in Jersey too.